Appendix

Appendix.

Appendix

Sections 31, 32, 66 and 67 of Public Utilities Act of California.

Sec. 31. The railroad commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things, whether herein specifically designated or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

Sec. 32. (*a*) Whenever the commission, after a hearing had upon its own motion or upon complaint, shall find that the rates, fares, tolls, rentals, charges or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, practices or contracts, or any of them, affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, discriminatory or preferential, or in anywise in violation of any provision of law, or that such rates, fares, tolls, rentals, charges or classifications are insufficient, the commission shall determine the just, reasonable or sufficient rates, fares, tolls, rentals charges, classifications, rules, regulations, practices or contracts to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

(*b*) The commission shall have power, upon a hearing, had upon its own motion or upon complaint, to

investigate a single rate, fare, toll, rental, charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts and practices, or any thereof, of any public utility, and to establish new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts or practices, or schedule or schedules, in lieu thereof.

(c) The commission shall have power and it shall be its duty, upon a hearing, had upon its own motion or upon complaint, to determine the kind and character of facilities and the extent of the operation thereof, necessary to reasonably and adequately meet public requirements for service furnished by common carriers between any two or more points, and to fix and determine the just, reasonable and sufficient rates for such service and whenever two or more common carriers are furnishing service in competition with each other the commission shall have power, after hearing had upon complaint or upon its motion, when necessary for the preservation of adequate service and when public interest demands, to prescribe uniform rates, fares, tolls, rentals, charges, classifications, rules, regulations and practices to be charged, collected and observed by all such common carries. (Amended Statutes 1923, Chapter 288, page 837.)

SEC. 66. After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in said action or proceeding and specified

in the application for rehearing, and the commission may grant and hold such rehearing on said matters, if in its judgment sufficient reason therefor be made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless such corporation or person shall have made, before the effective date of said order or decision, application to the commission for a rehearing. Such application shall set forth specifically the ground or grounds on which the applicant considers said decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in said application. Any application for a rehearing made ten days or more before the effective date of the order as to which a rehearing is sought, shall be either granted or denied before such effective date, or the order shall stand suspended until such application is granted or denied. Any application for a rehearing made within less than ten days before the effective date of the order as to which a rehearing is sought, and not granted within twenty days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application. If any application for a rehearing be granted without a suspension of the order involved, the commission shall forthwith proceed to hear the matter with all despatch and shall determine the same within twenty days after final submission, and if such determination is not made within said time, it may be taken by any party to the rehearing that the order involved is affirmed. An application for rehearing shall not excuse any corporation or person from com-

plying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission may by order direct. If, after such rehearing and a consideration of all the facts, including those arising since the making of the order or decision, the commission shall be of the opinion that the original order or decision or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate, change or modify the same. An order or decision made after such rehearing abrogating, changing or modifying the original order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission.

SEC. 67. Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the rendition of the decision on rehearing, the applicant may apply to the supreme court of this state for a writ of certiorari or review (hereinafter referred to as a writ of review) for the purpose of having the lawfulness of the original order or decision or the order or decision on rehearing inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. On the return day, the cause shall be heard by the supreme court, unless for a good reason shown the

same be continued. No new or additional evidence may be introduced in the supreme court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the constitution of the United States or of the State of California. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceeding. Upon the hearing the supreme court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure of this state relating to writs of review shall, so far as applicable and not in conflict with the provisions of this act, apply to proceedings instituted in the supreme court under the provisions of this section. No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; *provided*, that the writ of mandamus shall lie from the supreme court to the commission in all proper cases.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1926

No. 403

SUTTER BUTTE CANAL CO. (a corporation),
Plaintiff in Error,

vs.

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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vs.

THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

The Sutter Butte Canal Company, plaintiff in error, complains of an order of the Railroad Commission of California fixing the rates for its public utility service of irrigation water to consumers in the Counties of Butte and Sutter. The order in question, known as Decision 16,289 in case 2126, decided March 20, 1926, was reviewed by the California Supreme Court and its validity upheld. It now comes before this Court on writ of error to the Supreme Court of California.

This decision of the Railroad Commission is reported in Volume 27 of the Opinions and Orders of said Commission at page 765, and appears in the printed record herein at pages 24-60. The decision of the California Supreme Court is reported in Volume 202, California Reports at page 179 and appears in the record herein at pages 229-241.

Plaintiff in error attacks the order of the Commission on the ground that said order results in the taking of its property for public use without compensation and deprives it of property without due process of law, in violation of the 5th and 14th amendments to the Constitution of the United States. More specifically, plaintiff in error contends that these results follow from (1) the operation of new rules established for the service of water to certain contract-holding consumers; (2) the exclusion from the rate base of certain donations made by consumers during the development of the so-called Sutter County extension; (3) the alleged failure of the Commission to give any weight to a so-called reproduction cost estimate submitted by plaintiff in error, and (4) the alleged failure of the Commission to allow a fair rate of return.

Defendant in error will answer these various contentions in the order in which they have been advanced, and will present its argument under the following headings:

I. The newly established rules affecting service to contract-holding consumers violate no constitutional rights of plaintiff in error.

II. In fixing the rate base the Commission properly excluded sums contributed to the development of the so-called Sutter County extension.

III. In fixing the rate base the Commission properly refused to be controlled by an alleged reproduction cost estimate submitted by plaintiff in error.

IV. There is no basis in this record for the claim that the rates fixed by the Commission will not yield a full and fair return.

ARGUMENT.

I.

THE NEWLY ESTABLISHED RULES AFFECTING SERVICE TO CONTRACT HOLDING CONSUMERS VIOLATE NO CONSTITUTIONAL RIGHTS OF PLAINTIFF IN ERROR

Plaintiff in error is a public utility water company engaged in the sale and distribution of water for irrigation purposes in the Counties of Butte and Sutter, California, and has served at one time or another 81,000 acres of a total of 105,000 acres tributary to its system (R. 26, 190). The company is successor to the Butte County Canal Company, a public utility water company engaged in like business from 1904 to 1911.

Prior to 1918, plaintiff in error and its predecessor company rendered service to its consumers exclusively by contract. These contracts varied in form, but the main features of all of them were that the consumers paid an initial amount (usually $10.00 per acre) for the privilege of obtaining the contract and agreed to pay a stipulated rate for irrigation water service each year thereafter upon the total acreage covered by the

contract, while the company on its part agreed to furnish the water, as required, for all the acres covered by the contract. For ordinary crops the contract rates varied from $1.00 to $2.00 per acre, and in the case of rice were ordinarily $5.00 per acre, since the raising of rice requires considerably larger quantities of water.

Of course, the fact that water was being sold by this company under contract did not militate against it assuming and having impressed upon it the status of a public utility (*Palermo Land & Water Co. v. Railroad Commission*, 173 Cal. 380; *Limoneira Company v. Railroad Commission*, 174 Cal. 232; *King v. Railroad Commission*, 190 Cal. 321, involving this very company), but the growth of the business and the development of the territory which it served occasioned the rendering of a decision by which the Railroad Commission directed this utility to serve all new consumers upon application and thenceforth to cease the practice of entering into contracts for its water service (Dec. No. 5227, 15 C. R. C. 425, March 25, 1918).[1] However, the existing contracts were allowed to stand, except that in fixing the rates to be charged for this service the contract-stipulated rates were increased. By reason of the initial payments which the then contract-holders had made, a lower rate was established for them than for the other (non-contract) consumers. It was provided that non-contract holders

(1) As was pointed out in the brief for plaintiff in error, it was agreed in the "joint praecipe and stipulation for transcript of record" in this case that none of the decisions and orders of the Railroad Commission made before its decision 16,239 need be copied in the transcript and that either of the parties might refer in their brief and argument in this Court to any such prior decisions and orders.

could place themselves in the favored class and pay the same rates as contract holders by making an initial payment of $10.00 per acre.

In view of the later history of this utility, it can now be seen that much tribulation would have been saved all parties if in this first comprehensive rate case the Commission had established a uniform system of charges applicable to all consumers. In establishing the new schedule it changed the rates fixed in the contracts—as it had undoubted authority to do; it might well have gone one step further and set up a single schedule of rates for all consumers.

The fact that it did not do this gave rise to many complications. When the rates came up again for general revision and a similar double set of rates was again established, certain of the contract consumers obtained a writ of review from the California Supreme Court, alleging that the order of the Commission was unlawful, in so far as it required contract consumers to pay rates for service on land covered by their contracts, but not irrigated.

The decision of the Commission was upheld by the California Supreme Court, and this ruling was affirmed by this Court (*Live Oak Water Users Association v. Railroad Commission*, 192 Cal. 132; *Live Oak Water Users Association v. Railroad Commission*, 269 U. S. 354; 70 L. Ed. 305). The present plaintiff in error appeared in both of these actions in support of the Commission's order.

The situation at that time was, therefore, that there existed on the system of this public utility two dis-

tinct sets of rates, one applying to non-contract-holders, the other to contract-holders. The result of this anomalous situation was a series of cases involving heated controversies between the company and various groups of its consumers, until at last the Commission, as the result of a new proceeding, terminated all differentials in rates between the contract holding and non-contract holding groups of consumers. This was accomplished in Decision 14,422, decided December 31, 1924 (25 C. R. C. 810) in which, at page 816, the Commission stated:

> "Another matter for consideration is the very general and long standing dissatisfaction and discontent existing on this system, which has been brought about mainly by the alleged discrimination due to the present form of rate schedule which provides for two classes of consumers, namely, contract holders and noncontract holders. The contract holders all protest against the increases made in the rates which had formerly been fixed in their original contracts. A certain large group also protests against the so-called 'standby charge' whereby under the terms of their contracts they are obligated to pay the established rate for water whether the land is irrigated or not. A considerable number also desires the abrogation of these contracts in their entirety. The non-contract holders have protested the differential allowed contract holders in the present form of rate, claiming that an undue burden of the charge is thereby placed upon them and they have suggested that a rate be provided which would place all consumers on the same basis. It is evident that a continuation of these conditions will seriously retard the future development of this territory and, at the same time, the successful operation of this irrigation system will be rendered an economic impossibility. It is the opinion of the Commission that the time has come to

> eliminate the differential in favor of the contract holders, but we desire to state that it is not the intent of this decision to make, or attempt to make, any change in these contracts, or in the relations between the company and the contract holders, other than to fix the rates."

The Commission, in this decision, also made effective against non-contract consumers the so-called stand-by charge feature of its rate schedule. It was found that certain non-contract consumers were taking water at infrequent intervals and thus capitalizing on the favorable market price of rice. This resulted in an advantage to the opportunist and in a discrimination against the steady consumer, and it was therefore provided that all non-contract consumers, in addition to the regular charge prescribed for water used, should henceforth pay a stand-by charge of $1.25 per acre on all land irrigated, and further pay such charge on said lands for a period of two years after active use of the water was discontinued. In other words, the rates in so far as the stand-by charge was concerned were put upon a three year unit basis. The contract consumer, under said decision paid the same acre rate as the non-contract consumer, but also paid the stand-by charge of $1.25 at all times on all land covered by his contract. The rules effective under that decision as to both classes of consumers are set forth at page 819 of the reported opinion and order and are quoted in the brief of plaintiff in error pages 14-19.

Decision 14,422 became effective January 20, 1925, and plaintiff in error operated thereunder until the

making of Decision 16,289, dated March 20, 1926,—the decision now before this Court. This last named decision is the result of an investigation on the Commission's own motion into the rates and rules of plaintiff in error, which investigation was instituted primarily to inquire into contentions of certain contract holders who claimed the rates then in effect were discriminatory (R. 25, 76). The record shows that the rates then in force were discriminatory in their operation as to the contract consumers (R. 77, 79), and the Commission, in this decision stated (R. 27, 28):

> "Without reviewing the entire contract situation, it seems sufficient to state that we are convinced from the evidence that a discrimination exists at the present time. The enforcement of this continuous contract obligation is not only detrimental to the consumers as a whole and to the district but also to the company as an operating utility as well. No district can progressively advance when continuously in turmoil over existing or believed inequities and discriminations. This chaotic condition should be eliminated. We are convinced that either all the land should be under continuous contracts, which would be somewhat similar to an irrigation district situation, or all land should be treated uniformly under noncontinuous contracts. Operating as a public utility, it appears impracticable or impossible to make effective the former. The company as a public utility will be required however to eliminate the discrimination and treat all consumers alike as to the obligation for service. In general a return to the prior form of rate schedule which provided for a differential in rates between contract and noncontract lands is not favored and does not solve the problem. As a matter of fact it appears clear to this Commission that the

elapsed time and advantages flowing from previous decisions of this Commission have eliminated any reasons for the reinstating of such a differential.

The question of this Commission's jurisdiction to abrogate these contracts has been raised. From the consumers' standpoint, it seems that little remains of these contracts except the alleged obligation in perpetuity to pay charges upon all of the land covered. From the company's standpoint, as an operating utility, we see no apparent value in demanding the perpetuation of the contracts, and, in fact, it would appear that the unrest in the district resulting from their continuation is a real detriment to the company. The estimated additional receipts from the enforcement of these contracts on non-irrigated lands is relatively small, one estimate being that the total would be approximately $5,000 per annum under the present form of rate with the service charge fully in effect. We believe in this proceeding that rates should be based upon a uniform contract, applicable to all consumers, and that any reduction in revenue which might occur from the waiving of charges under the continuous contracts be absorbed in such schedules."

Under this last cited decision of the Commission, three rules were promulgated with reference to the rates to be charged for services to the two classes of consumers (Rules: R. 57, 60; rates: R. 44, 57). Under these rules it is provided in brief that non-contract consumers shall pay a service charge of $1.25 per acre and fixed irrigation charges per acre (dependent upon the water use) on all lands covered in their respective applications—so long as the water is used for active irrigation. The service charge of $1.25 on such acreage continues for a period of two years after such use is

discontinued. Such consumers, of course, are under no obligation to take water or pay service charges except as obligated by their respective applications.

In an effort to terminate all discrimination in rates between contract and non-contract consumers, it is provided in said opinion and order that the contract consumers, if they so elect, can avail themselves of the same rate schedule as is applicable to non-contract consumers, and once such contract consumer so elects to abide by such rate schedules no provision is made in the rules or otherwise for his return to the rate schedule provided for those who remain contract consumers under Rule 3 (R. 59). Under that rule it is provided that contract consumers "who desire to obtain water under that contract in lieu of the three year contract, as provided in Rules 1 and 2, may upon notice to the company continue so to do."

Under this rule any contract consumer so electing to obtain water under his contract must pay the service charge of $1.25 per acre and the other charges fixed in the schedule of rates (dependent upon the nature of the use) on all land for which service is desired in any particular year and for a period of two years the service charge of $1.25 per acre on the land covered by the contract as to which no service is desired. This service charge of $1.25 per acre is also payable on the land for which service is desired—for a period of two years after said service is discontinued.

Either class of consumer under the new rules may elect to discontinue using water and by following the

requirements of the rules effect his release from further payments.

Thus, it appears that the various objections which are urged as to the alleged options open to the contract users according to the contentions of plaintiff in error (Brief 24-26) are more apparent than real and that the contract and non-contract rate schedules are, for the first time, truly comparable.

Under the provisions of the California Constitution, Sec. 23, Article XII, and the Public Utilities Act of California, (California Statutes 1915, page 115, as amended), the California Railroad Commission is vested with broad regulatory powers over public utilities of the State. Under Section 32 of said enactment, the Commission is given specific power and authority to regulate rates, prescribe rules and terminate discriminations. Section 23, Article XII of the California Constitution is set forth in the decision of the California Supreme Court in this matter (R. 232-233), and Sections 31 and 32, 66 and 67 of the Public Utilities Act of California, all of which were referred to in the said decision of the California Court, are set worth in full in the appendix to the brief of plaintiff in error.

The California Supreme Court has repeatedly held that the Railroad Commission in the exercise of its jurisdiction is vested with power and authority to alter, modify or abrogate contracts existing between such utility companies and consumers.

Law v. Railroad Commission, 184 Cal. 737, 740;
Limoneira Co. v. Railroad Commission, 174 Cal. 232, 238;

Southern Pacific Co. v. Spring Valley Water Co., 173 Cal. 291, 298;

Traber v. Railroad Commission, 183 Cal. 304, 312.

In *Law v. Railroad Commission*, supra, at page 739, it is stated:

> "There is no longer any question as to the power of a state to fix rates for a public utility service which will supersede rates for such service previously fixed by private contract between the consumer and the company. It has been conclusively settled that the interference with private contracts by the state regulation of rates is but a legitimate effect of a valid exercise of the police power which neither impairs the obligation of a contract nor deprives of property without due process of law. (*Atlantic Coast Line Ry. Co. v. Goldsboro*, 232 U. S. 548, 558, (58 L. Ed. 721, 34 Sup. Ct. Rep. 364, see also, Rose's U. S. Notes); *Union Dry Goods Co. v. Georgia Public Service Corp.*, 248 U. S. 372, (9 A. L. R. 1420, 63 L. Ed. 309, 39 Sup. Ct. Rep. 117); *Southern Pac. Co. v. Spring Valley Water Co.*, 173 Cal. 291, (L. R. A. 1917E, 680, 159 Pac. 865); *Limoneira Co. v. Railroad Com.*, 174 Cal. 232, (162 Pac. 1033).) It is immaterial that petitioner's contract was entered into prior to the enactment of the present Public Utilities Act and the amendment thereto by which steam-heating service was included as a utility to be regulated. If the service contracted for was devoted to public use (*Allen v. Railroad Com.*, 179 Cal. 68, (8 A. L. R. 249, 175 Pac. 466)), the contract for the service was subject to the exercise of the police power and, the state having elected to confer upon the commission the power to prescribe uniform rates for the service, petitioner cannot complain if the exercise of this power results in the practical annulment of his private contract fixing compensation for a public

service. *(Producers' Transp. Co. v. Railroad Com.*, 251 U. S. 228, (64 L. Ed. 239, 40 Sup. Ct. Rep. 131).)"

The same principle is enunciated in *Market Street Railway Company v. Pacific Gas & Electric Co.*, 6 Fed. (2nd) 633, wherein it is stated:

> "On the question of the power of the state to regulate the contracts of its public utilities with their consumers the law is now well settled. 'The courts hold that all contracts relating to public service, entered into between the corporation operating a public utility and the private consumer, contain from the very nature of their subject-matter an implied reservation of the right of the state to lawfully exercise its police power for the general welfare, and that there is no impairment of the obligations of contract within the guaranties of the state or federal Constitution, even though said contract is thereby rendered partially or wholly invalid.' In re *Guilford Water Company's Service Rates*, 118 Me. 367, 108 A. 446, 450; *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 376, 39 S. Ct. 117, 63 L. ed. 309, 9 A. L. R. 1420; *Producers' Transportation Co. v. Railroad Commission of the State of California*, 251 U. S. 228, 232, 40 S. Ct. 131, 64 L. ed. 239; *Arkansas Natural Gas Co. v. Arkansas Railroad Commission*, 261 U. S. 379, 382, 43 S. Ct. 387, 67 L. ed. 705; *Ogden Portland Cement Co. v. Public Utilities Commission of Utah*, 258 U. S. 609, 42 S. Ct. 381, 66 L. ed. 788."

The plaintiff in error, and its predecessor company, Butte County Canal Company, as above pointed out, have operated continuously as public utility water companies from 1904, the date of the organization of the Butte County Canal Company, and all of their waters have been dedicated to public use. All waters covered

by the contracts in question are waters impressed with a public use (*King v. Railroad Commission*, 190 Cal. 321). This fact is sustained by the record (R. 192) and conceded by plaintiff in error (Brief p. 4 et seq). Yet, plaintiff in error in its brief has, in effect, argued that contracts such as are involved in this case now before the Court cannot be changed by the Railroad Commission or by the State in the exercise of the police power as was done in Commission Decision 16,289 for the alleged reasons that the water rights enjoyed by the land owners under the said contracts are easements appurtenant to the lands and constitute servitudes upon the canals and ditches of the company (Brief of plaintiff in error, p. 53 et seq). In support of this argument are cited the cases of *Allen v. Railroad Commission*, 179 Cal. 68, and *Stanislaus Water Co. v. Bachman*, 152 Cal. 716.

We submit that these decisions do not support this contention of plaintiff in error. In *Allen v. Railroad Commission*, supra, although the California Supreme Court held that the Railroad Commission was without authority to modify certain water contracts, similar to those under consideration herein, *the entire decision went on the ground that the waters covered by the contracts in question had never been devoted to public use*. So also, in *Stanislaus Water Company v. Bachman*, supra, it should be noted that for the purposes of the decision the Court therein assumed that the waters involved in the contracts there under consideration were private waters which had not been devoted to public use. Certain *dicta* in this decision which might well be construed to hold that contracts for the

use of waters devoted to public use create vested rights which cannot be altered by the State in the exercise of its police power does not represent the law in California today (*Leavitt v. Lassen Irrigation Company*, 157 Cal. 82).

It is now well established under the California decisions that the owner of water devoted to public use cannot, by contract or otherwise, carve out of the public trust a preferential private right; that any contracts purporting to grant permanent and continuous rights to such waters "of course, would not technically attach it to the land as an appurtenance. It would do nothing more than bring the land within the territory to which the public use extended and establish its *status* as land permanently entitled to share in the public use."

Leavitt v. Lassen Irrigation Company, supra, 92, 93;

Byington v. Sacramento Valley, 170 Cal. 124, 133.

See also *Glenn-Colusa Irrigation District v. Paulson*, 75 Cal. App. 57, 69, wherein the Court stated:

> "The Supreme Court of this state in *Leavitt v. Lassen Irrigation Company* (supra) heretofore referred to, holds, in substance, that no private estate can be created in property devoted to a public use, and a consumer of water cannot have a water right in the sense of a private free hold interest in the real estate of the distributing company; that his right is simply a right of service. This, of course, carries with it the right to that service so long as the public utility controls the instrumentality rendering service. The exercise and enjoyment of such right of service does not

create an easement such as is contemplated by Section 552 of the Civil Code, but is a service rendered by a public utility subject to regulation and control of the state in such manner as may be prescribed by law."

In *Southern Pacific Company v. Spring Valley Water Co.*, supra, it was stated at page 298:

"Any contract purporting to give such preference in the public use, or to transfer a part of the dedicated public supply to private use, is subject to revision by competent public authority, to the end that the public service shall not be unjustly discriminatory, or unreasonable, and that the private use shall not interfere with the public use, and such contracts may, by such authority, be reformed accordingly, to make them conform to the public interest. (*Tuttle Creek Borough v. Pennsylvania W. Co.*, 243 Pa. 408, (90 Atl. 194); *Bellevue Borough v. Ohio V. W. Co.*, 245 Pa. 117, (91 Atl. 236); see, also *Fresno etc. Co. v. Park*, 129 Cal. 437, (62 Pac. 87); *Stanislaus W. Co. v. Bachman*, 152 Cal. 725, (15 L. R. A. (N. S.) 359, 93 Pac. 858).) In the case first cited it is said that the power to fix rates and regulate public service of water devoted to public use 'carries with it jurisdiction to determine the reasonableness of charges, irrespective of prior contract; to that extent such contracts may be reformed.' But until such public authority has intervened and modified such prior contract, it will be recognized as valid, and enforced in the courts, as declared in our decisions above cited. *The power to revise and reform contracts of public service water companies, in the interest of the public, applies as well to a contract creating or attempting to create an easement in the water held for public use as to any other disposition thereof.*

In this state this power of revision and regulation is now, and was when this controversy arose, lodged in the railroad commission by the

Public Utilities Act of 1911. (Stats. 1911, Spec. Sess., p. 18; Const., art. XII, sec. 23.)" (Italics ours.)

Plaintiff in error in its brief has urged that the holding of the California Supreme Court in *Live Oak Water Users Association v. Railroad Commission*, 192 Cal. 132, is inconsistent with its holding in the decision now under review. The decisions are in no way inconsistent. In the *Live Oak* case the Court had before it for review an order of the Commission fixing rates for the two classes of consumers on the system of plaintiff in error, that is, contract and non-contract consumers and the only question before the Court was whether or not the Commission had regularly pursued its authority in so classifying its consumers and in requiring the contract consumers to pay a charge based upon all of their lands covered by the contract, regardless of whether all of the said lands were irrigated. The Court held that the Commission had regularly pursued its authority and affirmed the order. It was *not* held in that decision, as plaintiff in error suggests, that the Commission could not modify or alter the contracts in question; on the contrary, the Court, in effect, held that the Commission may properly do that very thing in the exercise of its authority. Any dicta in the decision to the effect that the Commission could not have done otherwise than it did in its order should be construed in the light of the issues there involved. In commenting upon this former decision the California Court in the decision now under review said (R. 236):

> "Any language found in the case of Live Oak etc., Assoc. v. Railroad Commission, supra, which may seem to be at variance with these views must be read in connection with the issue there involved, which was the validity of this dual classification among users of this utility and the right to charge against contract-holders the service fee on the lands not irrigated. The power of the Commission to disregard the duration period of said contracts was not there involved."

We submit that under the above cited authorities the California Railroad Commission has complete authority to modify the rate provisions of the contracts involved herein—to disregard said rate provisions provided in said contracts and to establish new rates and rules for the computation of said rates. The order now in question concerns *only* rates and the computation of rates. No attempt was made by the Commission in the issuance of said order to determine or adjudicate the rights of the respective parties under the contracts, in any particular other than in the matter of rates. The respective rights of the parties under these contracts in the light of the order of the Commission could not and cannot be litigated here or in this proceeding—these other matters can only be determined before some other tribunal and in some other proceeding which properly puts them in issue.

It should be noted that plaintiff in error, in urging that the order of the Commission violates its Federal Constitutional rights because it modifies the contracts, has failed to cite a single decision of this Court.

II.

IN FIXING THE RATE BASE THE COMMISSION PROPERLY EXCLUDED SUMS CONTRIBUTED TO THE DEVELOPMENT OF THE SO-CALLED SUTTER COUNTY EXTENSION.

The plaintiff in error further contends that its constitutional rights were violated by the action of the Commission in excluding from the rate base certain sums donated to the company by consumers during the period of construction of the Sutter County Extension. The record shows that the Commission, in establishing the rate base in question, did not include therein the sum of approximately $309,000.00, representing the total amount of contributions to the company by prospective consumers who were to be served by the new extension (R. 82-84; Railroad Commission Exhibit 20, R. 98-110).

In this regard, the following statement was made in the Commission's decision (R. 30 to 31):

> "The effect of the construction of the Sutter County extension by the company on the rates of the Sutter-Butte Canal Company has been the subject of much controversy. It has been the belief of many of the landowners in Butte County that this extension was entirely unjustified and that it has resulted in an extra and unreasonable burden on the water users in that county. Much testimony was introduced relative to this matter. It appears that in 1918 certain landowners of Sutter County negotiated with this company for a supply of water. In 1919, an agreement was entered into for the service of 14,400 acres by the construction of distribution laterals and the utilization of the Live Oak slough for the conveying of water to this general territory. The cost of the construction was to be paid in full by the landowners and later to be refunded on the basis

of one-seventh of the annual revenue received. In 1920, it was found necessary to extend the main canal to this district and discontinue the use of the Live Oak slough. A new contract was entered into whereby the landowners were required to advance $20 per acre, while the company agreed to complete the construction and install a pumping plant on Feather River. *The total cost of the project was approximately $835,000 and the company's investment slightly over $526,000. This work was done at the peak of prices and, in addition, was rushed so that without question the cost exceeded a reasonable cost under present conditions and some additional cost over normal construction occurred at the time of the development. In past decisions, the amount of the rate base for this extension has been the amount invested by the company.* During the general period of high prices, over $400,000 was expended by the company in additions on other parts of the system for the improvement of the service and to serve additional acreage. The Sutter County extension stands out alone as a large single expenditure and was opposed during its construction by Butte County water users. *Without question, any excess cost due to unreasonable expense on rush work should be excluded in a permanent rate base.* A portion of the advances by landowners must be considered as covering this cost, as it was for their benefit the work was rushed. A utility must make normal extensions in periods of high as well as low prices and to the extent that this is required it can not be reasonably urged by consumers first served during periods of low prices that their rates should not be affected by the increased costs resulting from the fulfillment of this obligation." (Italics ours).

As pointed out in the above quotation, the past decisions of the Commission have uniformly excluded the amount of the said contributions and donations

made by prospective consumers to the plaintiff in error and used in the development of this extension. In its decision No. 10,372, (21 C. R. C. 623, April 26, 1922) the Commission stated, at page 632:

> "In our opinion, the cost of the Sutter County extension was considerably more than normal, by reason of the urgent character of the work to meet the pressing demands for rice irrigation. We do not believe that this cost is a correct measure of the value of the property constructed in so far as rate fixing is concerned. As above noted, however, the consumers donated the sum of $286,000 for the purpose of securing the immediate completion of the extension. For the purposes of this decision, therefore, we will not include in the allowance of value for the Sutter County extension the amount donated by the consumers."

With regard to these so-called donations the California Supreme Court, in reviewing the order of the Commission in question, stated (R. 238):

> "Petitioner also complains that the Railroad Commission excluded from the rate base an item of $300,000.00, donated by the landowners towards the cost of what is known as the Sutter County Extension. Where there is sufficient legal evidence found in the record to sustain the Commission's order, it is not within the power of this court to interfere. (*Williamson v. Railroad Commission*, 193 Cal. 22, at 35.)"

After quoting a portion of the above quotation from said Commission's decision 16,289, the Supreme Court further stated (R. 239):

> "The Commission for the reasons indicated above excluded the item and allowed only the investment by the Company. There is no contention that the evidence does not warrant the

observation above quoted. We see no ground upon which the court may interfere in such a situation. The fact that the item has been consistently excluded in previous orders to which the petitioner made no protest convinces us that it has placed its chief reliance upon the questions above discussed and not upon this action of the Commission."

Hence, it is seen that the California Railroad Commission, in computing the rate base allowed the sum of $526,000.00, as representing the investment of plaintiff in error in the Sutter County Extension properties and excluded the sum of $309,000.00 so donated by consumers for the reason that it largely, if not wholly, represented the excess cost of the improvement due to unreasonable expense and rush work.

A number of authorities have been cited by plaintiff in error in its brief in support of the proposition that a public utility is entitled to earn a fair return on all of its properties devoted to public use and that the constitutional protection afforded is not dependent upon the source of the money used to purchase the property. Among such cited authorities are *Board of Public Utilities Commission v. New York Telephone Company*, 271 U. S. 23, 31; 70 L. Ed. 808, and *San Joaquin & K. R. Canal & Irr. Co. v. Stanislaus County*, 233 U. S. 454, 58 L. Ed. 1041. We concede these decisions to be sound law. We submit, however, that they are not applicable to the present case, inasmuch as the contributions in question were not excluded from the rate base because they were donated to the company by consumers but were excluded for the reason that the Commission found in effect that

the *value* of the Sutter County Extension properties is reasonably represented by the amount of the investment of plaintiff in error exclusive of the donations.

The record herein contains no dependable testimony either offered by plaintiff in error or otherwise, to controvert the fairness or the validity of such finding.

Plaintiff in error, in the proceeding in question before the Railroad Commission, offered in evidence through witness Ryan what purported to be a reproduction cost estimate of the value of the properties devoted to public use: (R. 128-150; Sutter Butte Canal Co., Exhibits C and D, opposite R-150). This estimate of value proved to be wholly unreliable and of such a speculative and theoretical nature that no weight whatever could be given to it by the Commission. The reasons for so judging the testimony of this witness are set forth at length under Subdivision III of this brief, infra, and will not be reiterated here. Suffice it to say that no dependable testimony reflecting value of the properties was introduced or offered in evidence by plaintiff in error. Not one word of reliable testimony was offered to prove the fair value of the properties devoted to public use to be of a value in excess of the figure allowed by the Commission in its rate base, or to show the fair value of Sutter County Extension properties to be in excess of the amount allowed therefor in the rate base as fixed by the Commission.

It is well established that it is presumed that in fixing rates the public authority has acted fairly and the burden of proof is on the utility challenging the

rates to prove them to be unreasonable or confiscatory. In the recent decision of this Court in *United Fuel Gas Co. v. Railroad Commission of Kentucky*, decided January 2, 1929, reported in Advance Opinions 73 L. Ed. 105-108, it was stated:

> "The burden of proving the value of property on which they are constitutionally entitled to earn a fair return rests upon the appellant and, to justify judicial interference with the action of the State officials in fixing the rate assailed, it must be supported by clear and convincing evidence. (*Knoxville v. Knoxville Water Company*, 212 U. S., 16, 53 L. Ed. 371, 381, 29 Supreme Court Reporter 148)."
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> *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153, 163, 59 L. Ed. 1244, 1250;
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> *Minneapolis v. Minnesota Ry. Co.*, 186 U. S. 257, 264, 46 L. Ed. 1151, 1156.

It appears, therefore, that plaintiff in error cannot properly protest or challenge the action of the Commission in fixing the rate base in question, inasmuch as no reliable testimony was offered by it to show the properties to be of a value in excess of the rate base allowed.

In this proceeding, in the absence of any other evidence, the Commission simply adhered to its former rulings and excluded from the rate base that portion of the cost of the extension which had been contributed by consumers. We submit that in so doing, it did the fair thing by this company in the light of all the evidence and in the light of what had been done in previous cases where its action had been approved and supported—even before this Court—by this utility

(Live Oak Water Users Assn. v. Railroad Commission, supra).

III.

IN FIXING THE RATE BASE, THE COMMISSION PROPERLY REFUSED TO BE CONTROLLED BY AN ALLEGED REPRODUCTION COST ESTIMATE SUBMITTED BY PLAINTIFF IN ERROR.

Plaintiff in error has challenged the validity of the Commission's order on the further ground that the Commission "failed to give any consideration" to the reproduction cost of its physical properties in the fixing of the rate base. The answer to this contention is simply that very careful consideration was given by the Commission to the so-called reproduction cost estimate submitted by plaintiff in error, the same having been submitted through witness Ryan (R. 128-150) Sutter Butte Canal Company Exhibits C and D opposite R. 150), and having found said estimate to be entirely unreliable and unsound, refused to be controlled by it. The exhibits of witness Ryan were the only ones submitted purporting to reflect a reproduction cost new estimate of value.

With reference to the Ryan exhibit, the Commission stated in its decision (R. 33):

> "The Commission, in fixing the rates now in effect, used as a rate base its findings in Decision No. 5227, dated March 25, 1928, (15 C. R. C. 425) plus additions and betterments since the date of the appraisal therein, less the advances by land owners in connection with the Sutter County Extension. An exhibit on this basis was presented in this proceeding by Mr. H. A. Noble, an

Assistant Engineer of the Commission. The rate base for October 1, 1925, following the former decision, was estimated at $1,785,610.00. Two estimates were presented by the Sutter Butte Canal Company in this proceeding, one by Norton Ware, local manager, and one by J. T. Ryan, consulting engineer. The estimate of $2,085,468.00 presented by Mr. Ware, was on the basis of the historical investment, and closely approximates the amount as set forth above if the advances by land owners of the Sutter County Extension are deducted. An estimate of the reproduction cost new, totaling $2,676,118.00 was presented through Mr. Ryan. This was based upon the appraisal by Mr. Ware applying price result with a view to determining the probable reproduction cost new under 1924 price conditions. This appraisal was of a very general nature, and the evidence indicates a failure on the part of Mr. Ryan to take into consideration changes in the art of construction and use by him of other general assumptions which would tend to give a figure in excess of reasonable."

The California Supreme Court, in reviewing the Commission's decision in question, stated (R. 240):

> "As to the further contention that the Commission arbitrarily refused to consider reproduction cost in its rate fixing order, an examination of the record discloses that the Commission only had before it on that subject the testimony of the witness Ryan, who had admittedly used a number of uncertain assumptions which would render his estimate inaccurate and the Commission was well within its authority in determining that it could base no conclusion upon this testimony. Of it the Commission said: 'An estimate of reproduction cost new totaling $2,676,118 was presented through Mr. Ryan. This was based on the appraisal by Mr. Ware, applying price ratios with a view to determining the probable reproduction cost new under 1924 price conditions. This appraisal was of a very general nature and the evidence indi-

cates a failure on the part of Mr. Ryan to take into consideration changes in the art of construction and the use by him of other general assumptions which would tend to give a figure in excess of reasonable.' (27 C. R. C. 765, 773).

"The witness concerning his own testimony said: 'This is not an attempt to make a reproduction valuation of the property, or show the cost of reproducing it, but only to convert the investment actually made into terms of dollars (fol. 327) of 1925 levels.' It is not a fair characterization to say the Commission arbitrarily refused to consider the item of evidence and found it insufficient upon which to predicate action. The legality of the system of valuation employed is, therefore, not raised on this record."

There is an abundance of evidence in the record to sustain the conclusions of the Commission with reference to the estimate of "reproduction cost new" submitted by Mr. Ryan. It appears from his testimony that he took as one of the bases of his figures an exhibit presented by Mr. Ware (R. 123-128; Sutter Butte Canal Company Exhibit B opposite R. 128), which exhibit was made up of a segregation of the physical properties of plaintiff in error based on the 1918 appraisal of the properties as made by the Railroad Commission in its decision 5227, supra, and additions and betterments to the properties since that date, as reflected by the books of the company and as used by the Railroad Commission in rate decisions rendered subsequent to the 1918 decision. Using the above exhibit as a basis, witness Ryan sought by the use of certain "conversion factors," to show a value, under prices as of the date of investigation, much greater than that fixed by engineer H. A. Noble.

In determining the "conversion factors," Mr. Ryan used an exhibit which had been used by the Commission in another valuation case (condemnation proceeding), which exhibit showed certain price trends in the San Francisco district. Mr. Ryan segregated the various items contained in Mr. Ware's appraisal and applied to them percentage factors derived from these price trends. He obtained the figures for land value by applying to earlier figures a multiple which he obtained by dividing the total assessed value of the property in Sutter County at the time of his investigation by the assessor's totals in the earlier period.

It is obvious that, if such a study possesses any probative value at all, such value is extremely tenuous. It might be a proper method to "prove" or corroborate the results arrived at by more exact and scientific studies, but standing alone its significance is slight. Mr. Ryan made no examination of these properties to determine their condition at the time of the inquiry; he made no examination even of local price trends (R. 132, 146). Nor did he take into consideration any of the many efficiencies and economies which would be possible were this system now to be reproduced under present-day methods (R. 135, 137). Mr. Ryan, we repeat, was the only witness to testify as to reproduction cost new, and his testimony forms the sole basis for petitioner's claim as to this item. Of this testimony, he himself stated:

> "*This is not an attempt to make a reproduction valuation of the property, or show the cost of reproducing it*, but only to convert the investment actually made into terms of dollars of 1925 levels" (R. 124). (Italics ours.)

This then, is the witness's own estimate of the nature of his testimony. He added that his figure does not reflect the influences that changed construction methods would show, or changed efficiencies of labor (R. 135). All of these facts, said the witness, would affect a reproduction theory and would probably bring about a final result different from that which he presented. He stated that he did not "believe" that the figure would be less than he had shown, but this statement can hardly be given weight in view of the fact that it is wholly unsupported by any facts, figures or theories even remotely tending to disclose any logical foundation for the witness's "belief" (R. 136).

Moreover, on cross-examination, Mr. Ryan reiterated his admission that his figures refer "to the expenditure rather than to the property" (R. 137). In other words, this is not an estimate of the reproduction cost new of this property. It does not even purport to be that. It is simply a table showing how certain expenditures *might* work out at a time different from that when they were made. Later on, the witness stated that his testimony did not even purport to establish the *value* of the property as of the present time (R. 141), and though he added that he was trying to show the cost of reproducing it, this statement must be taken in the light of the one above quoted to the effect that this "is not an attempt to * * * show the cost of reproducing it," and also in the light of the witness's admission that if a true present reproduction theory were to be applied, his figures would be changed. He used no "unit prices," and adopted mere over-all ratios (R. 141). He considered no

changes in labor efficiency; no mechanical or construction developments.

With reference to the application of price trends, reflected by Exhibit D (R. opposite 150) in arriving at his "conversion factors" the witness stated:

> "It (Exhibit D) covers representative commodities that were characteristic of the development of costs in the installation of *electric systems* and are not designed altogether for a study such as the one before us" (R. 130). (Italics ours.)

As to lands, this witness's testimony was even more tenuous. He made no investigation of actual land values, in fact, he knew nothing about that (R. 148). He presented no study of sales or market prices—all he did was to look at the assessment rolls and because the sum total of the assessment for lands in Sutter County had increased by a certain ratio from one period to another, he assumed that the value of the lands and rights of way of the petitioner—throughout its entire system—had increased in value by a similar ratio. He admitted that he was unaware whether the figures he used included improvements (R. 145), and he declared that he used the trend or factor found in Sutter County assessments to indicate land value changes on this whole system, including the Butte County lands. As to the latter, he stated that he felt it improper to use the Butte County assessments since he found that they had doubled in one year (R. 149). In other words, he looked at the assessment books of both counties and seized upon those of Sutter County because they showed a gradual increase rather than a jump. In neither case did the witness show that the

assessment figure bore any logical relation to the actual value of the lands here in question. And if this method has any significance whatever, it must be of a very minor character, since it is based upon such insecure foundations. Nothing was shown as to the methods or accuracy of the assessments which were used. Neither the assessor himself nor his books were produced. No facts were disclosed as to the reasons for the alleged increases in assessments or the basis upon which they were made. Here, then, as in the case of other alleged values, the examination made by this witness was *nil;* his methods were elusive and his testimony was of an exceedingly superficial nature.

Plaintiff in error has cited a number of authorities of undoubted excellence dealing with the duty of regulatory bodies to consider "present reproduction cost" in arriving at the rate base for the establishment of public utility rates, among them being *Bluefield Water Works Company v. Public Service Commission*, 262 U. S. 679; 67 L. Ed. 1176; *McCardle v. Indianapolis Water Co.*, 272 U. S. 400; 71 L. Ed. 316.

We concede these authorities to be sound. In the ordinary case, where there is ample evidence upon all of the many factors which are to be considered in establishing the "fair value" of a public utility's property for rate-making purposes, it is clear that reproduction cost at the date of the inquiry is an element which must be given proper consideration. The cases do not declare that this element is controlling nor that it must be given any greater weight than other proper elements of value. What they do say is

that it must be given a very careful consideration when shown to exist.

But this does not mean that the Commission can act without evidence. This element of value must be shown to exist by competent testimony. If it does not appear in its record, or if the evidence regarding it is not of sufficient weight or credibility, the Commission cannot utilize a figure drawn from thin air, or base thereon its "consideration" of present reproduction cost in estimating "fair value."

We submit that the Commission is not bound by any rule of law to accept and act upon such tenuous evidence of "reproduction cost new" as was offered in this proceeding, and we submit that this Court should not and will not annul the Commission's order because it did not do so. This plaintiff in error had its day in court—it was free to introduce any testimony it desired upon these points—it did not do so. Instead, it presented this so-called "study" which we respectfully submit, the Commission could not do otherwise than reject in so far as it is claimed to possess probative value on the question of present reproduction cost. As we have seen, in rate proceedings, the burden of proof as to value is upon the utility asserting it (*United Fuel Gas Co. v. Railroad Commission of Kentucky*, supra). In the present instance, this utility simply failed to produce competent testimony to support its claim.

The Commission's judgment as to the credibility and weight of such testimony is worthy of serious consideration by this Court. We believe its action

not only to have been proper, but to have been the only action which it could have taken. Manifestly, to have added the total amount claimed by this witness to the "rate base" would have been improper, in view of the statements of the witness as to how he arrived at his figures; and the Commission had no method by which it could logically fix upon any sum less than this figure. To have seized upon some arbitrary amount out of this figure would, we submit, have been as improper as to have taken the full figure itself. The Commission was in a position where—upon the state of the evidence,—it could do nothing other than it did.

IV.

THERE IS NO BASIS IN THE RECORD FOR THE CLAIM THAT THE RATES FIXED BY THE COMMISSION WILL NOT YIELD A FULL AND FAIR RETURN.

The last point urged by plaintiff in error to the effect that the rates fixed by the Railroad Commission in the decision now under review will not yield a fair return upon the fair value of its properties is wholly without support in the record.

The sole basis of this contention is to be found in certain allegations made by plaintiff in error in its petition for a rehearing filed before the Railroad Commission after its decision fixing these rates had been issued (R. 67-71).

There is absolutely no scintilla of evidence to support them. This appears from the very statement of

plaintiff in error in its brief now on file in this court, pages 44 et seq.

The mere fact that certain allegations are contained in a petition for rehearing cannot traslate them into testimony, even though they be contained in a verified pleading. They were not before the Commission when it fixed the rates; they could not have been considered by the Commission, and we submit that they cannot be considered by this or any other court dealing with the decision which the Commission had already rendered before the so-called "estimates" were even seen by it.

Under these circumstances, we do not believe it necessary to burden the Court with argument on this point of rate of return. Suffice it to say that the Commission in its decision (R. 36, Table II) estimated the acreage that plaintiff in error might expect to irrigate in the coming three or four years. The various estimates found by the Commission are not challenged by plaintiff in error. Applying the minimum rates established by the Commission (R. 44-46) to the total expected acreage estimated by the three witnesses submitting estimates (R. 36) we find that a gross return from operations of approximately $250,000.00 may be expected on the basis of the estimate of witness E. A. Julian, a return of approximately $275,000.00 on the basis of the estimate of witness H. A. Noble, and a return of approximately $305,000.00 on the basis of estimate of witness L. S. Wing. Deducting from these estimated amounts the annual operating expenses of plaintiff in error, estimated by the

Commission at $142,000.00 (R. 39) and the sum of $19,000.00 allowed by the Commission for depreciation (R. 35), we find that under these respective estimates the net return to the plaintiff in error on the rate base of $1,760,000.00 fixed by the Commission (R. 34) will amount to approximately 5%, 6.5% and 8.2% respectively.[2]

The exact gross return to be derived by plaintiff in error in any single year under the rates fixed by the Commission cannot be predicted with any degree of accuracy. The nature of the business of plaintiff in error is highly seasonal, and is dependent upon the acreage planted by its consumers which in turn is largely controlled by the current and expected market price of rice (R. 208-209). The above estimates, therefore, are to be treated as but approximations.

If a schedule of rates has been in effect for a reasonable period, the result can be ascertained and known by all, and if the return is shown to be not adequate, the utility may then and there apply for an increase. In the present instance, the Commission was of the opinion that the schedule which it established would bring to this utility a full and fair return and there is not a scintilla of evidence in the record to sustain an attack on that determination.

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(2) In applying the lowest rates fixed by the Commission in its Order to the various estimates of acreage to be irrigated, and in thus arriving at the above estimates of return on the investment, it should be noted that we are assuming that there will be no appreciable loss in revenue to the plaintiff in error through the operation of Rule III (R. 59) which, as hereinabove pointed out, will permit the contract consumers upon certain conditions to discontinue the continuous payment of the fixed service charge on the acreage covered by their contracts. However, the loss in revenue to plaintiff in error through the operation of this rule should not exceed $5000.00 per annum, according to one estimate (R. 28, 107).

It is well established by the authorities that this Court will not interfere with rates fixed by state authority unless it appears by clear and unquestionable evidence that the rates will result in confiscation of property.

Willcox v. Consolidated Gas Co., 212 U. S. 19, 41, 53 L. Ed. 382, 395;

Knoxville v. Knoxville Water Co., 212 U. S. 1, 17, 53 L. Ed. 371, 381;

Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 163, 59 L. Ed. 1244, 1250;

San Diego Land & Town Co. v. National City, 174 U. S. 739, 754, 43 L. Ed. 1154, 1160.

In the past this Court has evidenced extreme reluctance to set aside orders made by competent rate making bodies in advance of a fair test of their propriety.

Knoxville v. Knoxville Water Co., supra;

Willcox v. Consolidated Gas Company, supra.

In conclusion, it should be noted that the decision of the Railroad Commission assailed herein was rendered after exhaustive hearings had been held and after every opportunity had been given to plaintiff in error and other interested parties and associations to be heard. It was stated by the Commission in its decision (R. 25):

> "The proceeding involves a complete reconsideration of the entire matter of rules, rates and service of the Sutter Butte Canal Company. Records in previous proceedings have been stipulated into this proceeding only as to specifically designated portions.

> Certain reports previously before the Commission were introduced herein and are before us. A large amount of evidence was presented by the Engineering Department of the Commission, by the Sutter Butte Canal Company, the Farm Bureau Federation and the Sutter Butte Water Users Association, and a total of forty-three (43) exhibits was introduced and testimony covering 748 pages of transcript was taken. It would appear from a consideration of the testimony and exhibits that the record is very complete and definite and all parties were given a full opportunity to be heard."

In the past, the revenue obtained from rice land irrigation has comprised a large portion of this utility's revenues. The extreme fluctuation of such use is, however, disclosed by the fact that in 1922 and 1924 rice acreage varied from 28,128 acres to 15,000 acres respectively (Decision No. 14,422, 25 C. R. C. 815). Indeed, this great fluctuation in rice acreage and the corresponding fluctuation in the company's net revenues has been largely if not wholly responsible for the difficulties which have been met by plaintiff in error.

The Railroad Commission must fix rates for this public utility service upon such a basis that, on the average, the rate over a reasonable period will be fair, and the mere fact that rice acreage declines in any single year is of no moment, unless the decline becomes permanent. If this company should find, after a reasonable trial period, that the average acreage for rice use has so declined as to bring down the return below a fair level, then it may apply to the Commission for an increase in its rates.

The Commission in its decision has made every effort to fix rates which will insure a fair return to plaintiff in error upon the fair value of its properties devoted to public use. We submit that plaintiff in error has failed to show that the order of the Commission in any particular is unreasonable, capricious or otherwise unlawful, or that the California Supreme Court in upholding the order of the Commission failed in any particular to accord to plaintiff in error the judicial inquiry to which it was entitled.

We submit that the decision of the California Supreme Court sustaining the decision of the Railroad Commission of California should be affirmed.

Dated, San Francisco, California,
February 20, 1929.

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